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MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

GREGORY A. CHRISTIAN, *et al.*,	)	Cause No. DV-08-173
	)	
Plaintiffs,	)	**MEMORANDUM AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON ALL PLAINTIFFS' CLAIMS AS BARRED BY APPLICABLE STATUTES OF LIMITATIONS**
	)	
vs.	)	
	)	
ATLANTIC RICHFIELD COMPANY,	)	
	)	
Defendant.	)	

This matter is before the Court on the motion of Defendant Atlantic Richfield for summary judgment on all of the Plaintiffs' claims on the grounds that such claims are barred by the applicable statutes of limitations. The Plaintiffs oppose such motion. The motion has been fully briefed. The Court heard oral argument on the motion, together with several other potentially dispositive motions, on November 18 and 20, 2013. Accordingly, the pending motion is deemed submitted.

This is an action for damages brought by numerous residents and property owners in the Opportunity, Montana area. The Plaintiffs have brought eight claims against Defendant Atlantic Richfield, all of which arise from alleged environmental degradation caused by the Defendant's predecessor, The Anaconda Company. The Plaintiffs allege that Anaconda's smelting, mining and milling operations from 1884 to 1980 released arsenic and other harmful materials into the air, water and ground on their properties, where the alleged toxins remain today. The Plaintiffs

seek restoration costs and other damages, including punitive damages, as a result of the alleged environmental pollution at issue.

With respect to the instant motion for summary judgment, the Defendant argues that the Plaintiffs' claims accrued many years ago, and that the Plaintiffs knew or should have known of such claims long before they filed this action. The Defendant maintains that the Plaintiffs' claims are time-barred by the applicable statutes of limitations.

Summary judgment should never be a substitute for trial for trial when there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402, 404 (1993). However, summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Rule 56(c)(3), M.R.Civ.P.; *Eklund v. Trost*, 2006 MT 333, ¶21, 335 Mont. 112, 151 P.3d 870.

The moving party has the burden to show that no genuine issues of material fact exist. *McDonald*, 261 Mont. at 272, 862 P.2d at 404. "Once the movant has presented evidence to support his or her motion, the party opposing summary judgment must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact." *Howard v. Conlin Furniture No. 2 Inc.*, 272 Mont. 433, 436-37, 901 P.2d 116, 119 (1995). If the trial court determines that no genuine issue of material fact exists, it still must determine whether the moving party is entitled to judgment as a matter of law. *Grimsrud v. Hagel*, 2005 MT 194, ¶14, 328 Mont. 142, 119 P.3d 47. Finally, "all reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party who opposed summary judgment." *Heiat v. Eastern Montana College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996).

In the instant case, Plaintiffs' claims include negligence, public nuisance, private nuisance, trespass, strict liability for abnormally dangerous activity, constructive fraud, unjust enrichment and wrongful occupation of real property. All of the claims sound in tort.

It is undisputed that the Defendant properly raised an affirmative defense based on expiration of the applicable statutes of limitations in its answers to the Plaintiffs' original and amended complaints. As the party raising the affirmative defense, the Defendant bears the burden of proving such defense. Rule 8(c), M.R.Civ.P.

Statutes of limitations serve important public policy, specifically by promoting timeliness and certainty in litigation and by preventing stale claims. See, for example, *Nelson v. Twin Bridges High School*, 181 Mont. 318, 593 P.2d 722 (1979). Statutes of limitations represent a balance between competing interests. Wronged parties are afforded a reasonable time to initiate litigation and obtain redress, and potential defendants are protected from claims after the passage of the requisite periods of time. The various statutes of limitations do not distinguish between just and unjust claims. A trial court lacks discretion or authority to alter, change or ignore the statutory limits for commencement of civil actions. See, for example, *Schaffer v. Champion Home Builders Co.*, 229 Mont. 533, 747 P.2d 872 (1987).

Montana's statutes of limitations are set forth in Sections 27-2-101 *et seq.*, MCA. All civil actions must be commenced within the applicable statutes of limitations. Section 27-2-105, MCA. The general statute of limitations for tort actions (negligence and strict liability) is three years. Section 27-2-204, MCA. The statute of limitations for an unjust enrichment action is three years, Section 27-2-202(3), MCA. The statute of limitations for actions grounded in fraud is two years. Section 27-2-203, MCA. The statute of limitations for actions involving injury to property (public nuisance, private nuisance and trespass) is two years. Section 27-2-207. The statute of limitations for a wrongful occupation claim is two years. Section 27-2-211(1), MCA.

Conflicting statutes of limitations are to be resolved in favor of the longest applicable period, thus giving claimants the benefit of any doubt. See, for example, *Kearney v. KXLF Communications, Inc.*, 263 Mont. 407, 869 P.2d 772 (1994).

In the instant case, therefore, the Plaintiffs' claims are subject to a three-year statutory limitation.

Section 27-2-102, MCA, governs commencement of the applicable statute of limitations. As a general rule, a statute of limitations begins to run when a claim or cause of action accrues. *Bosch v. Town Pump, Inc.*, 2004 MT 330, 324 Mont. 138, 102 P.3d 32. Section 27-2-102(1)(a) provides that a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action is complete, and a court or other agency is authorized to accept jurisdiction of the action.

Section 27-2-102(2) states:

> Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation.

Section 27-2-102(3) sets forth the so-called "discovery rule" with respect to calculating the statutory limits for commencing civil litigation. Section 27-2-102(3) states:

> The period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party if:
>
> (a) the facts constituting the claim are by their nature concealed or self-concealing; or
>
> (b) before, during, or after the act causing the injury, the defendant has taken action which prevents the injured party from discovering the injury or its cause.

The Plaintiffs commenced this action on April 17, 2008. Accordingly, the Plaintiffs are barred from seeking recovery for any claims that accrued before April 17, 2005. Summary judgment in favor of the Defendant is appropriate unless the Plaintiffs' claims or causes of action accrued on or after April 17, 2005.

As noted above, the Anaconda Smelter operated for nearly 100 years. It is undisputed that operations at the Anaconda Smelter ceased in 1980. The historical operations of the smelter were well known to the property owners in and around Opportunity. In fact, Opportunity was a planned community intended to provide rural residential opportunities for smelter workers who wanted to live in close proximity to their workplace. The smelter is clearly visible from Opportunity, which is located approximately five miles to the west. The instant Plaintiffs are not the first area residents to file suit for property damage allegedly caused by toxic emissions from the smelter. For example, farmers and ranchers sought damages and injunctive relief in 1905 on the grounds that smelter emissions, including arsenic, were harming their livestock downwind of the smelter, the same area at issue in this action. *Bliss v. Anaconda Copper Mining Co.*, 167 F. 342 (D. Mont. 1909), *affirmed sub nom. Bliss v. Washoe Copper Co.*, 186 F. 789 (9th Cir. 1911). The United States, too, brought suit against The Anaconda Company as far back as 1910 for alleged damaged to trees on federally-owned land in the vicinity of the Anaconda Smelter.

As the result of the *Bliss* case and similar lawsuits, 61 of the properties at issue in this action are subject to "smoke and tailings" easements that permit the deposit of smelter waste on such properties. The owners of those 61 properties have actual or constructive knowledge of the recorded easements that appear in their chains of title.

Public knowledge that historical smelter emissions caused contaminants to enter the air and be deposited on the ground on properties in the vicinity of the smelter has been widespread for a century. The Plaintiffs' own experts concede that there was almost universal notice of the potential toxicity of metals emitted from the smelter soon after the onset of its operations.

More recently, in 1983 the Anaconda Smelter Superfund Site was established under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Superfund Site is vast, encompassing more than 300 square miles and including the communities

of Opportunity and nearby Crackerville. The Plaintiffs do not dispute that all of their properties are within the Superfund Site. For purposes of remedial activities under the supervision of the federal Environmental Protection Agency, the Plaintiffs' properties fall within a sub-category of the Superfund Site called the Community Soils Operable Unit, which addresses potential contamination in residential soils in the area.

It is undisputed that soil sampling has been available in the area since 2002. Residential yards with arsenic levels above an EPA-mandated threshold have been remediated, including at least two of the properties owned by the Plaintiffs.

It is undisputed that CERCLA required regular public notice of Superfund Site conditions and remedial actions, and afforded opportunity for public comment. Public access to relevant records has been available throughout the Superfund Site remediation process. Extensive media publicity has accompanied the Superfund Site activities. As late as April 13, 2005, an Opportunity Citizens Protection Association meeting included 46 area residents, 13 of which are instant Plaintiffs, and a university professor for the purpose of discussing environmental risks related to the historical smelting operations.

The Plaintiffs complain of conduct that ceased in 1980. Under the circumstances, the Plaintiffs cannot reasonably argue that they were unaware of some potential environmental damage to their respective properties until April 17, 2005 or thereafter.

Rather, the Plaintiffs contend that they are entitled to relief from the statute of limitations under the "discovery rule."

As set forth above, Section 27-2-102(3) would toll the statutory limitation if the facts constituting the Plaintiffs' claims were concealed or self-concealing, and if such facts were not discovered by the Plaintiffs or in the exercise of due diligence should not have been discovered by them prior to April 17, 2005.

The discovery rule represents an exception to the general application of the statute of limitations. As such, the Plaintiffs must establish that the facts constituting their claims were concealed or self-concealing. The discovery rule exception applies only if the nature of the injury or the party's relationship rendered discovery of the claim at issue "virtually impossible." *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F.Supp. 1339, 1347 (D. Mont. 1991), *affirmed,* 993 F.2d 676 (9th Cir. 1993). Moreover, the discovery rule does not require that the statutory limitation be tolled until a party knows every fact related to a claim. *Id*, at 678-79.

In response to the pending motion, the Plaintiffs failed to identify any particular fact discovered by them to support the existence of their claims or for which the concealment prevented them from discovering their claims through reasonable diligence. The Plaintiffs also failed to produce any evidence that the Defendant concealed relevant facts from them. Without citing any authority, the Plaintiffs baldly argue that "[I]nvisible pollution, which cannot be detected absent environmental sampling and laboratory analysis is, without question, self-concealing." The Plaintiffs' self-serving argument, however, ignores the circumstances of this case, including widespread awareness of the potential contamination of their properties and the availability of environmental testing or other opportunities to discover relevant facts. Ignorance of facts underlying a claim is not sufficient to save such claim. In the instant case, the Plaintiffs should have known the facts constituting their claims long before April 17, 2005. The Plaintiffs had sufficient information prior to that date upon which to exercise diligence to determine if they had any claim(s) against the Defendant. Accordingly, the running of the statutes of limitations on the Plaintiffs' claims is not tolled by Section 27-2-102(3).

Alternatively, the Plaintiffs argue that their claims are timely under the "continuing tort doctrine."

At the outset of its consideration of this argument, the Court notes that the continuing tort doctrine applies only to the Plaintiffs' claims for nuisance and trespass. See, for example, *Gomez v. State*, 1999 MT 67, ¶¶2-25, 293 Mont. 531, 975 P.2d 1258; *Montana Pole*, 993 F.2d at 679-80.

With respect to nuisance and trespass claims based on stabilized environmental contamination, the continuing tort doctrine applies only where the contamination continues to migrate and is reasonably abatable. *Burley v. Burlington Northern & Santa Fe Railway Co.*, 2012 MT 28, ¶99, 364 Mont. 77, 273 P.3d 825.

The Plaintiffs' reliance on the *Burley* decision in support of their argument that the continuing tort doctrine is applicable in the instant case is misplaced. Throughout the *Burley* opinion, the Montana Supreme Court confirms the requirement that the alleged environmental contamination be migrating if the applicable statutes of limitations are to be tolled. The instant Plaintiffs, however, have not identified any evidence that the environmental contamination on their properties continues to migrate. Rather, the Plaintiffs apparently concede that the environmental degradation on their properties has not changed in decades. Absent evidence of continued migration, tolling of the statutory limitation is not required and the question of whether the contamination is reasonably abatable need not be answered. *Burley*, ¶99.

In the interests of caution and clarity, the Court will briefly address the "reasonably abatable" element the continuing tort doctrine. The issue of reasonableness generally presents a fact question for the jury. *Burley*, ¶91. In determining whether contamination is reasonably abatable, several factors must be considered, including: the ease with which the harm could be abated; the cost of the abatement; the type of property affected; the severity of the contamination; and the length of time necessary to remediate the polluted area. *Burley*, ¶89 (citation omitted). In the instant case, however, the Plaintiffs have not identified facts showing

that their proposed abatement is reasonable. Rather, the Plaintiffs merely rely on the general rule that questions of reasonableness usually are directed to the jury, not the trial court.

The Plaintiffs did not specifically respond to the Defendant's evidence concerning the cost and timing that would be incurred under the Plaintiffs' proposed abatement plan. Moreover, the Plaintiffs do not address how they could circumvent the requirement that the EPA approve their proposed abatement.

The Plaintiffs' argument that "[A]ll of the experts agree ARCO's pollution "can be cleaned up" falls far short of satisfying the reasonably abatable standard. (See Plaintiffs' brief page 13.) As set forth in the Court's analysis above, the question is not whether the proposed remedy is possible but rather is it reasonable. The expert opinions cited by the Plaintiffs do not include any conclusions that their properties would be improved by their proposed abatement. Likewise, while the Plaintiffs' experts criticize the particulate levels selected by the EPA as requiring remedial action, such experts' discovery responses fail to identify any harm to any Plaintiff resulting from application of those particulate levels. Similarly, the Plaintiffs' experts do not identify any particular benefit of the particulate levels they would propose. Speculation is insufficient to establish an issue of material fact. Under the circumstances of the instant case, the Plaintiffs have failed to meet their burden of demonstrating conflicting material facts that should be presented to a jury. Accordingly, the recent *Burley* decision supports the Defendant's motion for summary judgment.

The Court finds the Plaintiffs' reliance on *Sunburst School District No. 2 v. Texaco*, 2007 MT 183, 338 Mont. 259, 165 P.3d 1079, unpersuasive. While *Sunburst* involved issues related to environmental contamination and restoration damages, the decision did not address the standard for determining a continuing tort.

The Court concludes, therefore, that the Plaintiffs are not entitled to relief from the applicable statutes of limitations based on the continuing tort doctrine.

For the reasons stated above, and pursuant to Rule 56(c)(3), the Court concludes that no issues of material fact exist concerning the pending motion, and that the Defendant is entitled to judgment as a matter of law.

IT IS ORDERED that the Defendant's motion for summary judgment on all of the Plaintiffs' claims on the grounds that such claims are barred by the applicable statutes of limitations is granted. The above-entitled action is dismissed.

IT IS FURTHER ORDERED that the parties shall bear their own costs and attorney fees with respect to the above-described motion for summary judgment.

DATED this 16th day of December, 2013.

Brad Newman
District Judge